Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

STATE OF ILLINOIS, *et al.*,

Petitioners,

v.

MICHAEL J. McDONNELL,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *Nevada v. Hall*, 440 U.S. 410 (1979), the Court held that the Constitution did not afford the State of Nevada sovereign immunity from a suit filed in the courts of California. The suit in that case involved an automobile accident. The questions presented by this petition are:

1. Whether, under *Hall*, 440 U.S. at 424 n. 24, a state tax auditor's age discrimination suit, brought against his employing State in the courts of a sister State, "interfere[s] with [the employing State's] capacity to fulfill its own sovereign responsibilities" and therefore poses a "substantial threat to our constitutional system of cooperative federalism."

2. Whether *Hall* should be reexamined in light of the Court's recent reinforcement of sovereign immunities from suit enjoyed by States and its recognition that such immunities can be implied from constitutional structure.

PARTIES

Petitioners are the State of Illinois, the Illinois Department of Revenue, and six officers or employees of that Department: Samuel McGaw, Michael Scaduto, Joe Bartletti, Juan Morales, Frank Nugnes, and Brian McGrail. Respondent is Michael J. McDonnell.

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INTRODUCTION

Petitioners the State of Illinois, its Department of Revenue and various officials of that Department, respectfully ask this Court to issue a writ of certiorari to the Supreme Court of New Jersey to review that court's judgement and opinion entered on March 2, 2000.

OPINIONS BELOW

The initial rulings of the Superior Court of New Jersey were made by letters dated September 19 and October 24, 1997, and were not published; they are reprinted in the Appendix to this Petition (App. 26-30). The decision of the Superior Court, Appellate Division, was issued on March 15, 1999 and is reported at *McDonnell v. State of Illinois*, 319 N.J. Super. 324, 725 A.2d 126 (1999). It is also reprinted in the Appendix to this Petition (App. 9-25). The opinion of the Supreme Court of New Jersey was issued on March 2, 2000, and is reported at *McDonnell v. State of Illinois*, 163 N.J. 298, 748 A.2d 1105 (2000). That opinion is also reprinted in the Appendix to this Petition (App. 1-8).

JURISDICTION

The Supreme Court of New Jersey entered its judgement on March 2, 2000. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(a), because Petitioners claim immunity from suit under the United States Constitution.

STATEMENT OF THE CASE

Respondent Michael J. McDonnell, a resident of New Jersey, was hired by the Illinois Department of Revenue (hereinafter "the Department") in 1988 to serve in the Department's field office in Paramus, New Jersey. (Like a number of other States, Illinois maintains revenue field offices in other regions of the country to facilitate the collection of appropriate Illinois state taxes from individuals and businesses located outside the State.) Respondent was hired as a trainee but was promoted to auditor after about a year on the job. During the course of his work at the Department, Respondent developed a history of unsatisfactory work performance. In particular, in early 1993 he was suspended for permitting a statute of limitations to lapse, and later that year it was discovered that he had failed for almost two months to turn in several checks that had been tendered to him in payment of tax obligations. After a full review by Respondent's supervisors in Paramus, the decision to fire Respondent was made by officials at the Department's central office in Springfield, Illinois. Respondent was fired in August 1993. App. 11-12.

Following his termination, Respondent sought and obtained unemployment benefits from the Illinois Department of Employment Security. He filed no action in Illinois challenging his termination. Instead, in July 1995 Respondent filed a suit in the Superior Court of New Jersey, Bergen County Law Division. Named as defendants were the State of Illinois, the Department, and officers and supervisory employees of the Department located in Springfield and in Paramus. The complaint alleged that Respondent's termination was based on his

age and therefore violated the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq*. It also included counts charging infliction of emotional distress, negligent termination and a violation of the Employee Retirement Income Security Act, 29 U.S.C. §1140 *et seq*.

Petitioners moved to dismiss on various grounds, including sovereign immunity. The Superior Court initially denied Petitioners' motion in a letter ruling, App. 29-30, but reconsidered just over a month later and in another letter ruling dismissed the case, App. 26-28. The court held, in part, that the State of Illinois, the Department and its officials could not be sued in New Jersey's courts because such a suit "would clearly offend the sovereign responsibilities of Illinois." App. 27. The court distinguished this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), noting that a suit involving a State's employment relationship with an employee was more likely to interfere with Illinois' capacity to "fulfill its sovereign responsibilities" than one involving a car accident, as in *Hall*. App. 27, *citing Hall*, 440 U.S. at 424.

Respondent appealed the dismissal of his suit to the Appellate Division of the Superior Court of New Jersey. That court reversed on March 15, 1999. App. 9-25. Citing *Hall*, the court held that the Constitution did not afford Illinois sovereign immunity from suit in New Jersey's courts, App. 14-15. The court did not address the distinction drawn by the trial court between a suit over termination of employment and one involving a car accident. The court went on to consider whether it would decline jurisdiction under the doctrine of comity. In deciding not to do so, the court noted that both Illinois and New Jersey, through their legislatures, had expressed strong

policies against age discrimination, including discrimination by the State as an employer: New Jersey by the enactment of its Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*, and Illinois by the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* The court held, however, that as an employee living and working in New Jersey, Respondent could not have challenged his firing under the Illinois statute but could do so under New Jersey's law. App. 16-20. The court concluded that declining jurisdiction in New Jersey would thus leave Respondent without a remedy. App. 20.

Petitioners sought and obtained leave to appeal to the Supreme Court of New Jersey. That court affirmed the Appellate Division's decision on March 2, 2000. App. 1-8. The court held that only the doctrine of comity, as opposed to sovereign immunity, could protect Illinois from suit in New Jersey courts. App. 2-4. Although the court did not specifically address the trial court's distinction between *Hall* and the instant employment discrimination case, the court did later observe, in addressing comity, that it perceived no "disruption" of Illinois' state governmental function (*i.e.*, tax collection) in permitting Respondent to challenge his firing in New Jersey's courts so long as Illinois collected taxes "without discriminating against employees who live in New Jersey in violation of [New Jersey law]." App. 7. (Nonetheless, the court barred reinstatement as a remedy for Respondent, finding that such an order "might constitute an affront to Illinois' sovereignty." App. 8.) The court disagreed with the Appellate Division in accepting Petitioner's contention that Respondent could, in fact, have challenged his termination in Illinois under the Illinois Human Rights Act, App.

3-4, but still declined to apply principles of comity because Respondent would now be barred from mounting such a challenge by Illinois' requirement that such challenges be filed within 180 days of the discovery of the discriminatory injury. App. 4; 775 ILCS 5/7A-102(A)(1).

Petitioners now seek a writ of certiorari from this Court to review the decision of the Supreme Court of New Jersey.

REASONS FOR GRANTING THE WRIT

1. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER ALLOWING ILLINOIS TO BE SUED IN THE COURTS OF NEW JERSEY OVER ILLINOIS' FIRING OF A STATE TAX AUDITOR WOULD INTERFERE WITH ILLINOIS' ABILITY TO FULFILL THE "SOVEREIGN RESPONSIBILITIES" OF THE EMPLOYMENT OF STATE AGENTS AND THE COLLECTION OF TAXES.

In *Nevada v. Hall*, 440 U.S. 410 (1979), this Court held that the United States Constitution did not provide States with immunity from suit in the courts of a sister State in connection with a lawsuit founded on an automobile accident. Although the Court spoke in general terms in concluding that the Constitution afforded Nevada no sovereign immunity from suit in California, it did indicate that this principle had limitations, and that those limitations were related to the important concept of the ability of States to fulfill their "sovereign responsibilities," *id.* at 410 n. 24. This case presents the Court with an opportunity to clarify those critical limitations.

Hall concerned a car accident that occurred in California, the forum State, and involved a vehicle owned and

driven by an employee of the State of Nevada. 440 U.S. at 411-12. A majority of the Court, reviewing both the text of the Constitution and writings related to its drafting and ratification, observed that the Constitution contained no express limitation on suits against States in the courts of other States. Although the majority conceded that the Framers were likely subject to the "widespread acceptance of the view that a sovereign State is never amenable to suit without its consent," *id.* at 420, it concluded that the attention of the drafters had instead been occupied by concerns with state immunity from suits in the newly-created federal courts, *id.* at 418-20.

Dissenting Justices recognized the absence of an explicit textual bar on suits against States in sister States' courts, but argued that the concept of state sovereignty, as contemplated by the framers and by the law of sovereign immunity as it had developed at that time, suggested that such a limitation was implicit. Justice Blackmun believed that the drafters of the Constitution had not mentioned state-to-state immunity because "it was too obvious to deserve mention," 440 U.S. at 431, and contended that "the source [of such immunity was] not in an express provision of the Constitution but in a guarantee that is implied as an essential component of federalism." *Id.* at 430. Then-Associate Justice Rehnquist agreed, arguing against the "literalism" of the majority and in favor of constitutional protection for States from suit in a sister State's courts as necessary for the effective operation of the "constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter." *Id.* at 433.

Although it accorded no immunity to Nevada, the *Hall* majority did recognize that its holding could well be confined to similar factual contexts. The majority spoke with little qualification ("paint[ed] with a very broad brush," as Justice Blackmun wrote in dissent, 440 U.S. at 427), but did recognize that disputes more substantive than those involving automobile accidents could raise more serious concerns regarding the constitutional relationship among States:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or Nevada, might require a different analysis or a different result.

Id. at 424 n. 24. The majority thus recognized that subjecting a sovereign State to the entry of judgement by the courts of an equal with respect to a matter more closely tied to the function of that State's government would carry greater constitutional implications and could alter not only the result, but also the "analysis" of whether the Constitution affords protection to States from such interference.

The instant case presents the very "occasion" posited in *Hall*. Respondent's lawsuit against Illinois and its officers, if permitted to continue, will place important state government concerns of Illinois under the review of New Jersey's courts. Unlike the traffic accident in *Hall*, Respondent's firing by an Illinois government agency im-

plicates two distinct subjects related to Illinois' ability to "fulfill its own sovereign responsibilities." First, the suit would examine Illinois' employment relationship with Respondent, and require Illinois to defend its decision to terminate that relationship.[1] The hiring and firing of its agents represents the discharge of one of a State's core "sovereign responsibilities." Second, Respondent's suit would implicate Illinois' decision regarding who may act as an agent of the State in the collection of tax revenues. As an auditor, Respondent was responsible for acquiring and evaluating information relevant to amounts of tax owed to Illinois and was authorized to collect tax payments on behalf of the State. The assessment and collection of tax revenues is an obvious and integral state function, one that is both essential to a State's operation and unique to its status as a sovereign entity. By contrast, the automobile accident case at issue in *Hall* presented Nevada in a role common to individuals, *i.e.* that of the driver of a car, and did not implicate any significant state policies.

The concerns Illinois faces as a result of Respondent's suit against it in a sister State's courts are categorically weightier than those presented by the traffic accident

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[1] That the Supreme Court of New Jersey ruled out reinstatement for Respondent as a discretionary extension of comity (App. 4-7) does not significantly reduce Illinois' concern about defending its official decisions in New Jersey's courts. The court did not do so as a matter of law, and comity provides no firm protection against the entry of an order in a sister State's court. In addition, in the instant case Illinois still faces the threat of financial penalties based on those decisions imposed by a co-equal sovereign.

suit in *Hall*. Those concerns test the limitations *Hall* itself placed on the holding that a State is afforded no immunity by the Constitution from suit in the courts of another State. This Court should grant review of the decision of the Supreme Court of New Jersey to clarify the extent to which a suit that implicates different and more important "state policies" represents a greater threat to cooperative federalism and so commands a different constitutional analysis of interstate relationships.

2. REVIEW SHOULD BE GRANTED TO PERMIT THE COURT TO REEXAMINE *NEVADA v. HALL* IN LIGHT OF ITS RECENT RECOGNITION THAT SOVEREIGN IMMUNITY MAY BE IMPLIED FROM THE STRUCTURE OF THE CONSTITUTION.

Twenty-one years ago, the Court examined the text of the Constitution and, finding in it no express limitation on suits against States in the courts of sister States, also declined to find such a limitation to be implied. *Nevada v. Hall*, 440 U.S. 410, 424-26 (1979). Dissenting Justices argued that immunity from such suits in the courts of co-equal sovereigns was a necessary, if implied, component of "the constitutional plan," 440 U.S. at 441 (Rehnquist, J., dissenting); *see also* 440 U.S. at 430 (Blackmun, J. dissenting) (immunity from suits in another State's courts "a guarantee that is implied as an essential component of federalism.").

The law of sovereign immunity has undergone substantial review since *Hall* was decided, and particularly within the last several years. Although recent opinions have focused on state immunity from suits in the federal

courts, their holdings, as well as their reinforcement of the rights of sovereign States to be protected from suit without consent, show that a reassessment of the *Hall* majority's unwillingness to read a limitation on sister-State suits into the constitutional model is in order. Indeed, this case perfectly presents the anomaly created by failing to extend constitutionally-based sovereign immunity to States as defendants in other States' courts. Respondent could have raised his age discrimination claim against Illinois in an Illinois forum,[2] but only because Illinois has so consented, *see* 775 ILCS 5/1-101 *et seq*. Similarly, absent such consent he could not have sued Illinois in federal court under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq*. *Kimel v. Florida Board of Regents*, ___ U.S. ___, 120 S.Ct. 631 (2000). Despite these protections against suit in its own or federal courts, though, Respondent has been allowed to maintain his suit, over Illinois' objections, in the courts of New Jersey. That a State should be less protected in the courts of a peer than in those of a higher (federal) sovereign or in its own courts cannot be reconciled with the Constitution's plan of a union of equal sovereigns.

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[2] Under the Illinois Human Rights Act, a charge of employment discrimination is not heard originally in court. It is initially filed with the Illinois Department of Human Rights, which conducts a full investigation. If the charge is sustained the Department files a complaint with the Illinois Human Rights Commission, which then hears the case. If the charge is dismissed by the Department the complainant may file his or her own complaint with the Commission. 775 ILCS 5/7A-102, 5/8A-102-03. Review of the Commission's decisions may be sought in the Illinois Appellate Court. 775 ILCS 5/8-111.

The *Hall* majority began its analysis by acknowledging that the concept of sovereign immunity substantially predated the Constitution, 440 U.S. at 414-15, and was "a matter of importance in the early days of independence," *id.* at 418 (footnote omitted). The Court observed that immunity from suit in one's own courts was absolute, but that similar protection from suit in the courts of another sovereign depended on "an agreement, express or implied, between the two sovereigns." *Id.* at 416.[3] The Court found no such express agreement among the States in the Constitution and declined to find that one was implied. The Court noted that immunity from suit in the courts of a sister State was not discussed in constitutional debates, and reasoned from this silence that the issue "was apparently not a matter of concern when the new Constitution was being drafted and ratified." *Id.* at 418-19.

The *Hall* Court's analysis is inconsistent with current methods of interpreting silence on the part of the Framers on an issue of immunity. This Court addressed the implications of constitutional silence for constitutional structure in *Alden v. Maine*, 527 U.S. 706 (1999). Although that case concerned Congress' ability to subject States to suits in their own courts, the Court did apply an analysis similar to that of *Hall*, but with much different results. In considering whether Congress had the authority to abrogate the immunity of States to suit in their own courts, the *Alden* Court, as had the Court in

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[3] The Court added that protection from suit could also be voluntarily extended by the forum State through application of the discretionary doctrine of comity. 440 U.S. at 416.

Hall, looked first to the debates leading to the ratification of the Constitution. As in *Hall*, the *Alden* Court found no express guidance in those proceedings: "the historical record gives no instruction as to the founding generation's intent to preserve the States' immunity from suit in their own courts." *Id.* at 741.

The *Alden* Court's inference from that silence, however, stands in marked contrast to that drawn in *Hall*. Whereas in *Hall* the Court had read silence to demonstrate a lack of concern on the part of the Framers, 440 U.S. at 419, *Alden* drew the opposite conclusion:

> We believe, however, that the founders' intent is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity. In light of the overriding concern regarding the States' war-time debts, together with the well known creativity, foresight, and vivid imagination of the Constitution's opponents, the silence is most instructive. It suggests the sovereign's right to assert immunity from suit in its own courts was *a principle so well established that no one conceived it would be altered by the new Constitution*.

527 U.S. at 741 (emphasis added);[4] *see also Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) ("The only reason why this immunity did not receive specific mention is

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[4] Indeed, the *Hall* Court had itself also noted that concern over Revolutionary War debts on the part of States underlay the Framers' concerns regarding sovereign immunity, 440 U.S. at 418, yet found their silence on the issue of immunity among States to demonstrate lack of interest.

that it was too obvious to deserve mention."). The *Alden* Court ultimately concluded that, even in instances not covered by the text of the Eleventh Amendment, "sovereign immunity derives . . . from the structure of the original Constitution itself. . . . [I]t follows that the scope of the States' immunity from suit is demarcated not by the text [of the Eleventh Amendment] alone but by fundamental postulates implicit in the constitutional design." 527 U.S. at 728-29; *see also Hall*, 440 U.S. at 430-31 (Blackmun, J. dissenting) (sovereign immunity "sufficiently fundamental to our federal structure to have implicit constitutional dimension."); 440 U.S. at 433-36 (Rehnquist, J., dissenting).

This Court has long recognized, as a general matter, that immunity from suit without consent is a well-recognized attribute of the sovereignty of States. *See, e.g., Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934); *Hans v. Louisiana*, 134 U.S. 1, 18 (1890). Although the Court's recent opinions have focused on States' immunity from federal suits, whether in federal courts (as in *Kimel*) or state court (as in *Alden*), the principles underlying sovereign immunity are no less at stake when a suit in the courts of a sister State is at issue. A State has no less need to be "free from judicial compulsion in the carrying out of its policies within the limits of the Constitution," *Great Northern Insurance Co. v. Read*, 322 U.S. 47, 51 (1944), when the entity exercising that compulsion is intended under the Constitution to be an equal; indeed, the offense to the State's sovereignty is greater. The Court should grant review in this case to permit a re-evaluation of its holding in *Hall* in light of its recent acknowledgment of the implicit structural underpinnings of state sovereign immunity.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of New Jersey should be granted.

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